No. 8129

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS L. EDMONDS, Administrator, Estate of John W. Mitchell, Deceased, and DOUGLAS L. EDMONDS, Administrator, Estate of Adina Mitchell, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S PETITION FOR A REHEARING.

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Subject Index

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PETITIONER'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Petitioner respectfully petitions this Honorable Court for a rehearing concerning, the following portion of its opinion herein:

> "With respect to the notes, however, Trust No. 822-B covers 'the said Trusts and all asets thereof'. The notes would be held in joint tenancy, only if they were a part of the trust property, for the specific reference to the notes in Trust No. 822-B, is sufficient in form to operate as a pledge

of the notes only, and not to make them a part of the trust property. The facts were stipulated and the Board included the stipulation by reference as findings of fact. The stipulation is silent as to whether or not the notes were a part of the trust property. The Board in its opinion stated that 'Certain of the property held under the above trust consisted of notes * * *'. There is also the statement that 'The property in question was held under an indenture of trust providing specifically that the interests of these two parties were as "joint tenants with right of survivorship."' Under these circumstances the Board's finding that the notes were a part of the trust property, is not controverted by anything in the record, and therefore petitioner has shown no error. If the assignments are broad enough to challenge such finding, on the ground that there is no evidence to sustain it, we must hold that the finding is sustained by the presumption of correctness attending the respondent's finding. 26 USCA sec. 1512(c); Buck v. Commissioner (CCA 9), 83 F. (2d) 786, and cases cited."

Let us break down the foregoing quotation from the opinion into its several statements and conclusions, and after considering them separately, we confidently hope the Court will grant this petition.

Summary of Argument.

First.

The opinion states that

> "The facts were stipulated and the Board included the stipulation by reference as findings of fact."

Such findings, necessarily, include the exhibits to the stipulation. We respectfully assert that there are no other facts than those included in the stipulation and exhibits, and that all such facts are included in the findings. All else contained in the Board's opinion must be conclusions or assumptions drawn from these facts. The proof of this is that it is only from the facts of the trust of April 1, 1924 (Tr. 102) that the Board could conclude that any of the property was held in joint tenancy.

SECOND.

The opinion states: "The stipulation is silent as to whether or not the notes were a part of the trust property." We respectfully assert that the stipulation is not silent on the point, but, on the contrary, claim that the stipulation and exhibits, properly considered together, disclose indubitably that the notes and proceeds thereof were not part of the trust property, and that any other conclusion therefrom is erroneous.

THIRD.

The opinion assumes that the Board *found* that the notes were part of the trust property. We respectfully assert that the Board did not and could not so *find*, because, necessarily, its findings of fact are those only contained in the stipulation and exhibits. It is true, the Board did, as a matter of law, *conclude* from these facts that the notes were part of the trust property. In that conclusion we contend the Board committed error.

FOURTH.

The opinion states: "If the assignments are broad enough to challenge such finding (conclusion), on the ground that there is no evidence to sustain it, we must hold that the finding (conclusion) is sustained by the presumption of correctness attending the respondent's finding (conclusion)." This statement contains three questions:

(A) Is there evidence to sustain the Board's finding (conclusion) that the notes are part of the trust property?

(B) Are the assignments broad enough to challenge the erroneous finding (conclusion)?

(C) Is the finding (conclusion) sustained by the presumption or correctness attending the respondent's finding (conclusion)?

FIFTH.

The opinion states:

> "Under these circumstances the Board's finding that the notes were a part of the trust property, is not controverted by anything in the record, and therefore petitioner has shown no error."

We believe we shall satisfy the Court that the Board may have drawn such an erroneous conclusion, but that it could not make any such finding of fact. And also we hope to satisfy the Court that such erroneous conclusion is not sustained by, but is actually contrary to, the record.

Argument.

FIRST.

The opinion is correct in stating that "The facts were stipulated and the Board included the stipulation by reference as findings of fact." The opinion (Tr. 171) states (Tr. 172): "The facts are formally stipulated and we include the stipulation by reference as our *findings of fact.*" Other than the stipulation and exhibits there were no *"facts"* before the Board. The Board could find no other *"facts"* than those in the stipulation and exhibits. The Board in its opinion itself recognizes this limitation in the very next sentence (Tr. 173), where it says: "Briefly stated the facts are that, etc." Then follows a paraphrase of the facts and certain assumptions and conclusions. But it remains true that the only *"facts"* which the Board could *"find"* are those contained in the stipulation and exhibits thereto. All else in the opinion are assumptions and conclusions drawn from the *"facts"* so found. And it is the assumption or conclusion that the notes and proceeds were part of the trust estate that is here under attack.

SECOND.

The opinion states: "The stipulation is silent as to whether or not the notes were a part of the trust property." Of course, it could not be assumed that either the petitioner or respondent would boldly admit and stipulate that the notes were or were not a part of the

trust estate, any more than it could be asssumed they would boldly admit and stipulate that all or any of the property was held in joint tenancy. That was and remains a *conclusion of law* which was and remains a substantial question in dispute, and concerning which the jurisdiction of the Board of Tax Appeals and this Court is invoked. What the parties did do, and all that it can be supposed they would do, was to stipulate the facts from which such a conclusion, either affirmative or negative, could be drawn. The same is true with respect to the question whether all or any part of the property was held in joint tenancy.

The stipulation first recites (Tr. 52, 53) that Mr. Mitchell, with Mrs. Mitchell's consent, conveyed certain real estate in trust to secure certain indebtedness of the former. The trust indentures covering such conveyance and the trust limitations thereon are incorporated as Exhibits "A", "B" and "C" (Tr. 54). The stipulation then states:

> "In the year 1923 Mr. Mitchell authorized the Title Guarantee and Trust Company to sell all of the Cahuenga acreage, title to which was conveyed to F. A. Hartwell in two separate parcels, the first of 115 acres in consideration of the sum of $345,000.00, of which $50,000.00 was paid in cash with a note for $295,000.00, secured by a deed of trust, evidencing the balance; and the second parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $90,000.00, secured by a deed of trust evidencing the balance.
>
> "Each of these notes was made payable to John W. Mitchell."

It is significant that "each of these notes was made payable to John W. Mitchell." If it had been then intended that the notes or proceeds would become part of the trust estate then, unquestionably, they would have been made payable to the trustee, so that the title thereto would have stood in the name of the trustee just as, and in lieu of, the real estate represented thereby. The stipulation then proceeds:

> "On April 1, 1924, the Title Guarantee and Trust Company issued a Declaration of Trust under number 822-B, a copy of which is hereto attached and marked Exhibit 'D'.
>
> "At that time Title Guarantee and Trust Company held title to the remaining portion of the real estate described in Declaration of Trust No. 822 *not theretofore conveyed to Hartwell or the Los Angeles Stone Company.*"

It is here again significant that the stipulators industriously stipulated that at the time of the execution of trust number 822-B, the construction of which is here in question, set out that *the trustee held only the remaining portion of the real estate not theretofore conveyed to Hartwell and Los Angeles Stone Company. The stipulators did not state that the notes and proceeds were then held by the trustee.* The stipulation then proceeds (Tr. 55):

> "At the times the two notes made by F. A. Hartwell hereinbefore mentioned, and the note made by Los Angeles Stone Company to the order of John W. Mitchell, referred to in Declaration of Trust No. 807, were executed and delivered by the payees thereof, *said John W. Mitchell de-*

posited them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness then owing by him to it. Said notes continued to be held by said Title Guarantee and Trust Company during the taxable periods here in question."

It is again significant here that the stipulators industriously stated that the transfer of the notes was *"as collateral security for the payment of certain indebtedness then owing by him (Mr. Mitchell) to it."* The stipulators here, by so stating, almost necessarily excluded these notes from the trust estate.

Turning now to Trust Indenture 822-B, of April 1, 1924, which is made a part of the stipulation as "Exhibit D" (Tr. 102), we find that it first refers to the conveyances and declarations of trust theretofore executed by John W. Mitchell (and not his wife) as security, and then proceeds to declare that the property the subject of those trusts shall be held "in trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, with right of survivorship," and then, and only then, is there reference made to the notes, indicating clearly that the parties to the trust agreement did not consider the notes to be a part of the trust estate, or something in which Adina Mitchell had any interest thereunder.

To recapitulate, therefore, we have: (a) The original trust indentures were executed only by Mr. Mitchell (recital, "Exhibit D"; Tr. 102); (b) the notes were made payable to Mr. Mitchell (stipulation, Tr. 54); (c) thereupon (Tr. 55) "John W. Mitchell deposited

them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness"; and, lastly, (d) the Declaration of Trust 822-B ("Exhibit D"; Tr. 103) divided the property subject to the trust into two categories: one, the real estate which it is declared shall be held as joint tenants, and, two, the notes. These facts are all contained in the stipulation, and therefore we assert that the stipulation is not silent as to whether or not the notes were part of the trust property. That is to say, all the *facts* are set forth, and there are no other facts, from which the Board in the first instance, and this Court in the second instance, could draw its conclusion as to whether the notes were part of the trust estate or not.

THIRD.

The opinion assumes that the Board *found* that the notes were part of the trust property. We have just demonstrated that the Board could not have *found:* that the Board *found* only the *facts set forth in the stipulation and exhibits.* It is true, the Board *concluded* from such facts that the notes were part of the trust estate. That this conclusion is erroneous is the contention here. That contention was also made before the Board and the argument in support of that contention is well stated in the petitioner's memorandum before the Board found on pages 190-196 of the record and which, in the interest of brevity, will not be here repeated.

FOURTH.

The opinion states: "If the assignments are broad enough to challenge such finding [conclusion], on the ground that there is no evidence to sustain it, we must hold that the finding [conclusion] is sustained by the presumption of correctness attending the respondent's finding [conclusion]." This statement contains three questions:

(A) Is there evidence to sustain the Board's finding (conclusion) that the notes are part of the trust estate?

We believe we have quite conclusively demonstrated that the "evidence" and the "findings" are identical. The only evidence before the Board was the stipulation and exhibits thereto, and the Board itself says that the stipulation and exhibits constitute its findings. The question, therefore, assumes a false quantity respecting the difference between the evidence and findings. The real and only question is whether the evidence and findings, identical as they are, sustain the conclusion or, rather, whether a correct conclusion has been drawn from the evidence and findings. In this respect we believe the Court itself has come to the correct conclusion, which will be discussed in our "Fifth" proposition.

(B) Are the assignments broad enough to challenge the erroneous finding (conclusion)?

The proposition here under consideration was made most emphatically before the Board (Tr. 190). The decision of the Board, contrary to the contention there made, is assigned as error before this Court as follows (Tr. 216-217):

"5. The Board of Tax Appeals erred in any event by failing to hold and decide that the said Declaration of Trust issued on April 1, 1924, was insufficient to create a joint tenancy with right of survivorship in the Hartwell and Los Angeles Stone Company notes which were definitely pledged with the said Trust Company to secure the individual indebtedness of the decedent, John W. Mitchell."

"9. The Board of Tax Appeals erred by failing to hold and decide that the Hartwell and Los Angeles Stone Company notes constituted a portion of the corpus of the estate of John W. Mitchell, deceased, and accordingly that payments thereon were not taxable as income to the decedent, Adina Mitchell, for the years 1925, 1926, 1927 and 1928."

"10. The Board of Tax Appeals erred by, in effect, holding and deciding that the principal of the Hartwell and Los Angeles Stone Company notes constituted both corpus of the estate of John W. Mitchell, deceased, and taxable income to the decedent, Adina Mitchell, when payments were made thereon during the years 1925, 1926, 1927 and 1928."

Also, it is so assigned in petitioner's brief, pages 8a-13, and the error is discussed in the brief at page 36.

We therefore respectfully claim that the assignments are sufficient to challenge the erroneous conclusion.

(C) Is the finding (conclusion) sustained by the presumption of correctness attending the respondent's finding (conclusion)?

Assuming, as we do, that we have satisfactorily demonstrated that the Board made no *finding* upon the subject of whether the notes were or were not included in the trust estate, but only a *conclusion* to the effect that the notes were part of the trust estate; and also assuming, as we do, that we have satisfactorily demonstrated that this erroneous conclusion is controverted by the evidence and findings (which are identical), and that exceptions were properly taken, then, of course, there is no room for any presumption.

FIFTH.

The opinion states:

> "Under these circumstances the Board's finding that the notes were a part of the trust property, is not controverted by anything in the record, and therefore petitioner has shown no error."

We have already discussed whether the Board made a finding or a conclusion in that respect, and we hope we have satisfied the Court that it is a conclusion and not a finding. Also, we hope we have satisfied the Court that such conclusion is controverted by not only anything but everything in the record. However, this Court, in its opinion, also states:

> "With respect to the notes, however, Trust No. 822-B covers 'the said Trusts and all assets thereof'. The notes would be held in joint tenancy,

> only if they were a part of the trust property, for the specific reference to the notes in Trust No. 822-B, is sufficient in form to operate as a pledge of the notes only, and not to make them a part of the trust property."

May we emphasize that here the Court comes to the correct conclusion that the notes were not a part of the trust estate, but were pledged "as collateral security for the payment of certain indebtedness then owing by him (Mitchell) to it (Title Compeny)" (Tr. 55).

May we ask, respectfully, where the Court secured the facts upon which to base its correct conclusion, if not from the same record from which the Board reached its incorrect conclusion. Obviously, the conclusion was reached from the evidence and facts which were before and under consideration both by the Board and the Court. If from such record before the Court the erroneous conclusion of the Board is controverted, then, obviously, it was controverted before the Board.

CONCLUSION.

Upon the foregoing analysis of the opinion of the Court, we respectfully petition the Court to grant a rehearing of so much of the opinion as is included in the portion of the opinion quoted.

Dated, San Francisco,
May 3, 1937.

F. ELDRED BOLAND,
KNIGHT, BOLAND & RIORDAN,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
May 3, 1937.

F. ELDRED BOLAND,
Of Counsel for Petitioner.